92-1818

No.

Supreme Court, U.S.
FILED
MAR 29 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners,

VERSUS

GRAYDEN TUBB, M.D., TOM McDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

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QUESTIONS PRESENTED

Whether the free speech clause of the United States Constitution Amendment One or the fair trial requirements of the United States Constitution Amendment Fourteen require an attorney to be permitted to conduct interviews with jurors, post-verdict, when he receives information indicating to him that there has been extraneous influence on the jury.

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OPINION BELOW

The Mississippi Supreme Court did not enter any written opinion on the issue presented by this Petition. The unpublished opinion of the Lee County Circuit Court is included as an appendix.

JURISDICTION

The United States Supreme Court has jurisdiction to review by Writ of Certiorari, under 28 USC Sec. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provisions involved are United States Constitution Amendment Fourteen, which requires that "due process of law" be afforded before one's life, liberty or property be taken, and United States Constitution Amendment One, which guarantees one the right to "freedom of speech".

STATEMENT OF THE CASE

The issue which Petitioners request that this Court decide is whether the United States Constitution Amendments One or Fourteen guarantee the right of a civil litigant to conduct post-trial interviews with jurors after the litigant has received information indicating that the jury may have been subject to outside influence.

The question arises from a medical malpractice case prosecuted by the Petitioners in the Circuit Court of Lee County, Mississippi.

On January 31, 1988, a jury in Lee County, Mississippi absolved the Respondent medical doctors and hospital from Petitioners' charges that they had rendered her a quadriplegic through improper application of cervical traction. During the trial, a juror (John Hankins) was seen talking with supervisory nurse employees of the Respondent hospital and was expelled from the jury, though he was allowed to sit with the jury for two days after this improper conduct. T., 1382-1386. At no time during the trial was there any evidence adduced that the juror (Hankins) either received any improper communications from hospital employees or that he had communicated this information to his fellow jurors. However, after the trial, Dr. William Gary, a local medical doctor who had testified as an expert witness for the Petitioners at trial, told Petitioners' attorney that an alternative juror (Denna) had related to him (Gary) information indicating that the jury had received adverse information about Plaintiff from outside sources. Specifically, Dr. Gary told the Petitioners' attorney (Lawson) that the juror had related to him (Gary) that the Petitioner was receiving "$7,000 from workers' compensation" per month for life.[1] Exhibit 2 to Petition for Rehearing. This information could only come from the Defendant, since the only $7,000 per month involved was an offer of settlement made by the Defendant in the amount of $7,000 per month.

Additionally, Petitioner's counsel obtained the affidavit of Juror Clifford Hill, which stated:

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[1] There was no evidence during the trial that the Plaintiff ever received any amount of money from insurance or otherwise.

> "During the second week of the trial, one of the jurors, who was a white man who sat on the second row on the outside, started talking about how much money Ms. Nichols was already being paid..."

Exhibit 9 to Petition for Extraordinary Relief

This information must have come from an extraneous source, since there was no evidence at trial that Plaintiff was paid any amount of money.

Supported by the affidavits of Gary and the juror, Petitioners' attorney, on April 27, 1988, moved the Court for authority to interview other jurors and for an evidentiary hearing. R., 614-616. On June 7, 1988, the trial judge denied the motions to interview the jurors and for a hearing. R., 626-627.

Petitioners, utilizing Mississippi Supreme Court Rule 21, then filed a "Petition for Extraordinary Relief", complaining about the failure of the trial judge to permit further interviews of jurors and failure to conduct a hearing, so as to demonstrate that extraneous matters had influenced the jury verdict.[2]

On August 19, 1992, the Mississippi Supreme Court rendered its opinion on the appeal. This opinion does not deal with the issue presented in the Petition for Extraordinary Relief (the right to conduct juror interviews post-verdict). The opinion, reported at 609 So. 2d 377, affirmed the judgment of the Lee County Circuit Court.

On September 9, 1992, the Petitioners filed a "Petition for Rehearing", which addressed both the Court's affirmance of the judgment of August 19, 1992 and the Petition for Extraordinary Relief, dealing with the jury issue. Various supplementations of the Petition for Rehearing were filed with the Mississippi Supreme Court, includ-

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[2] Inadvertently, Petitioners' counsel failed to file a proper caption for this pleading, and had led the pleading off with a "Statement of Facts". However, the Mississippi Supreme Court treated it as a Petition for Extraordinary Relief.

ing supplementations specifically bringing to the Mississippi Supreme Court's attention, the violations of the First and Fourteenth Amendment in failing to permit the attorney to interview jurors.

Respondents filed various pleadings with the Mississippi Supreme Court, arguing the Petition for Rehearing and its various supplements were untimely or otherwise procedurally incorrect.

On December 31, 1992, the Mississippi Supreme Court granted Petitioners' request for leave to file the various supplementations to the Petition for Rehearing. However, on the same date (December 31, 1992), the Supreme Court by an evenly divided four-four vote, denied the Petition for Rehearing. Again, there was no opinion from the Mississippi Supreme Court on the issue of the right to interview jurors post-verdict.[3]

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT TO DECIDE THE IMPORTANT CONSTITUTIONAL QUESTION OF WHETHER THE UNITED STATES CONSTITUTION AMENDMENTS ONE AND FOURTEEN REQUIRE A TRIAL JUDGE TO PERMIT AN ATTORNEY TO INTERVIEW JURORS, AFTER THE ATTORNEY HAS CAUSE TO BELIEVE THAT THE JURY HAS BEEN SUBJECTED TO OUTSIDE INFLUENCE.

Whether an attorney may communicate with jurors following the jury's verdict has been the subject of disagreement among the state and federal courts. Some courts have approved the practice of lawyers

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[3] The Mississippi Supreme Court was evenly divided, since one Justice did not sit. The failure of the Justice to sit was made "pursuant to internal operating rules". These rules are not a public record, and there is no reason, of record, for the failure of one Justice to sit on the Petition for Rehearing.

talking with jurors after a verdict, even for the mere purpose of self-education. See, for example *United States v. Narcisco*, 446 F. Supp. 252 (E.D. Michigan 1976); *Irving v. Bullock*, 549 P. 2 d 1184 (Alaska 1976).

On the other hand, other courts hold that communicating with the jury for the mere purpose of self-education, post-verdict, is improper and sanctionable. See, for example, *Sixberry v. Buster*, 88 FRD 561 (E.D. Penn. 1980); *United States v. Driscoll*, 276 F. Supp. 333 (S. D. NY 1967). Of course, when a Plaintiff's attorney seeks to interview the jurors not merely to satisfy his curiosity as to the grounds for verdict, but because the attorney believes that extraneous influence may have been exerted on the jury, a stronger case for allowing the communication with the jurors is made. Thus, *United States v. Sanchez*, 380 F. Supp. 1260, aff'd 508 F. 2d 388 (5th Cir. 1973), held jurors should be permitted to be interviewed where there has been shown good cause for believing that there was extraneous influence.

United States v. Narcisco, 446 F. Supp. 2d 252 (E.D. Michigan 1976), found the law "ambiguous" with regard to whether post-trial contact with jurors was permitted and questioned the advisability of a holding that any "cause" would be required. *Narcisco* noted that, absent contact with the jurors, the attorney would have no reason to know whether any outside information had gone to the jury.

On the other hand *Olberg v. Minneapolis Gas Co.*, 291 Minn. 334, 191 N. W. 2 d 418 (1971), set forth a broad rule that an attorney should *never* interrogate a juror or telephone him for the purpose of gathering evidence of jury misconduct. But the Minnesota Supreme Court was of the view that the trial court should be "liberal" in granting hearings so that extraneous influence could be explored in open court.

Haeberle v. Texas International, 739 F. 2 d 1019 (5th Cir. 1984), noted rules against post-trial juror contact raised First Amendment issues, but held the state's interest in protecting the privacy rights of jurors outweighed the free speech rights of a litigant seeking to interview jurors.

It is, thus, readily seen that there is a diversity of opinion among the lower courts on the issue of propriety of attorney contact with jurors post-verdict. The Fifth Circuit has decisively held it not unconstitutional to prohibit such ex parte contact where there is no prior showing of "cause" to suspect juror misconduct. However, the competing interest surely must be viewed differently where it is demonstrated that an attorney does have "cause" for suspecting that the jury has received improper influence. In this case, the Petitioner's attorney had such "cause" since he had information from a third party (Dr. Gary), as well as from two jurors, that the jury was aware of substantial workers' compensation payments being paid to Petitioner. In this context, the interest of the litigant in securing a fair trial for a catastrophic injury surely outweighs whatever speculative "privacy" interest a juror might have in failing to discuss whatever extraneous influences might have occurred.

The various inconsistency among the lower courts in deciding the issue here presented, however, is not the only reason for granting the Writ to decide the question of an attorney's right to question jurors, post-trial, after learning of possible prejudicial information given to them, A ruling prohibiting such juror contact, once an attorney suspects "extraneous influence", is also inconsistent with this Court's decisions. *Smith v. Phillips*, 455 U. S. 209, 71 L. Ed. 2 d 78, 102 S. Ct. 940 (1982), held that once possible jury bias is shown, the due process clause of the United States Constitution Amendment Fourteen requires a "hearing" before a new trial can be denied. Of course, a "hearing' could not be "meaningful" one required by due process, *Armstrong v. Manzo*, 380 U. S. 545, 14 L. Ed. 2 d 62, 85 S. Ct. 1187 (1965), if one cannot interview the potential witnesses to determine if extraneous influence exists. Counsel would hardly know what witnesses to call at the hearing if he could not first interview the jurors to determine whether some person did convey extraneous information to them, The requirement of a "hearing", as was held to exist in *Smith v. Phillips*, *supra*, necessarily implies the right to obtain potential witnesses to appear for the hearing. The requirement of a post-trial hearing necessarily implies the right to interview jurors to determine if there are such witnesses. By holding the Plaintiff's attorney first had to prove to the judge that there had been extraneous influence before jurors

could be interviewed, the trial judge makes the *Smith v. Phillips* requirement to a hearing meaningless. If the attorney cannot interview jurors to determine if there has been an extraneous influence, what is there to hold a hearing about?

General principals of law, announced under the "free speech" clause, are also violated by the prohibitions against interviewing jurors post-verdict.

While this Court has apparently not heretofore evaluated the restrictions on the right of counsel to talk to jurors post-verdict, this type of "speech" is well within the framework of that type speech this Court has held routinely protected. See, for example, *American Party of Texas v. White*, 415 U. S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) (Only a "compelling state interest" may justify any regulation or rules which limits freedom of speech.) Here, it is plain that the Constitution requires an "impartial jury". *Groppi v. Wisconsin*, 400 U. S. 505, 27 L. Ed. 2d 571, 91 S. Ct. 490 (1971). In order to assure that there was such an impartial jury, it is crucial that counsel be allowed to investigate his information that outside influences came to bear on the jury. The only state interest in prohibiting this communication is that of keeping the jury from being "harassed" or in keeping their deliberative process secret. This interest can readily be met simply by providing that counsel's questioning of the jury would be limited to matters of whether there was any extraneous matter brought to their attention.

Thus, when properly balanced, there is no legitimate interest in prohibiting the attorney from talking with the jurors post-verdict, and this Court should grant the Writ in order to decisively hold that prohibiting contact with jurors, once counsel has "cause" to believe that there has been extraneous influence upon the jury, violates the First Amendment.

Respectfully submitted,

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APPENDIX

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IN THE CIRCUIT COURT OF LEE COUNTY, MISSISSIPPI.

FRANCES NICHOLS
and DAVID NICHOLS — Plaintiffs

No. 19,993

VERSUS

GRAYDEN TUBB, M.D.,
LESTER C. WILLIS, M.D.,
THOMAS McDONALD, M.D., AND
NORTH MISSISSIPPI MEDICAL CENTER

Defendants

ORDER

This cause came on to be heard on the Ex Parte Motion To The Court To Interview Jurors filed by counsel for the plaintiffs on April 27, 1988, and the Court having heard the motion presented with preliminary authorities cited by counsel on May 16, 1988, and the Court having further received the taped conversations of plaintiff's counsel with jurors Denham and Stasko from said counsel and a transcript of the same obtained and attached as Exhibit A to this Order, FINDS and ADJUDICATES as follows, to-wit:

1. Section 606 (b) Mississippi Rules of Evidence prohibits inquiry into the mental processes of a juror but permits a juror to testify "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror",

2. That the burden is upon the moving party to show good cause to interview jurors with a reasonable expectancy of proving that extraneous prejudicial information was improperly brought to the jury's attention during the course of its deliberations and plaintiff's showing on this motion does not make a *prima facie* case under the rules of the Court. *Pan American Petroleum Corp. v. Pate*, 157 Miss 822, 128 So. 870 (1930) overruled on other grounds. See also *City of Meridian v. Bryant*, 232, Miss, 892, 100 So. 2d 860 (1959) and *Index Drilling Co. v. Williams*, 242 Miss. 775, 137 So. 2d 525 (1962).

3. That the transcripts of the telephone conversations between counsel for the plaintiff and juror Stasko and alternate juror Denham affirmatively reflect that neither those jurors, nor any of the other jurors who were involved in deliberations, received extraneous prejudicial information improperly brought to the jury's attention and reflect that no outside influence was improperly brought to bear upon any juror during the course of the deliberations.
It is therefore

ORDERED that plaintiff's Ex Parte Motion To The Court To Interview Jurors be and it is hereby overruled and denied.

SO ORDERED this the 7th day of June, 1988

CIRCUIT JUDGE

IN THE SUPPREME COURT OF MISSISSIPPI
DECISION HANDED DOWN
ON THE 31ST DAY OF DECEMBER. 1992

89-CA- 0590 Frances Nichols and David Nichols v. Grayden Tubb, M. D. ,Tom McDonald, M. D., and North Mississippi Medical Center; Appeal No. 19993 from Judgment dated February 8, 1988, Lee County Circuit Court; DISPOSITION - Petition for Rehearing Denied. Dan Lee, P. J., Sullivan, Pittman and McRae, J. J., would grant. Roberts, J., Not Participating according to Supreme Court Internal Rules. DISPOSITION-Motion for leave to supplement petition for Rehearing Upon Newly Discovered Information Granted. Order Entered. DISPOSITION - Motion for Leave to Further Supplement Petition for Rehearing Upon Newly Discovered Information Granted. Order Entered. DISPOSITION - Motion to Strike Petition for Rehearing and Supplementations Thereto Denied. Order Entered. DISPOSITION - Motion for Leave of Court to Supplement Record on Appeal Granted. Order Entered.